STATE OF MICHIGAN
IN THE SUPREME COURT

JOSEPH G. NICKOLA, Personal Representative of the Estates of GEORGE NICKOLA, deceased and THELMA NICKOLA, deceased,

Plaintiffs-Appellants,

vs.

MIC GENERAL INSURANCE CORPORATION,

Defendant-Appellee.

Supreme Court No: 152535
Court of Appeals No: 322565
Lower Case No: 05-81192-NI
(Genesee County Circuit Ct.)

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PLAINTIFF'S SUPPLEMENTAL BRIEF IN SUPPORT OF APPLICATION FOR LEAVE TO APPEAL

CERTIFICATE OF SERVICE

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Plaintiffs-Appellants answer "YES".

II. IS THE COURT OF APPEALS DECISION IN THIS CASE CONSISTENT WITH *YALDO V NORTH POINT INS CO*, 457 MICH 341 (1998) AND *GRISWOLD PROPERTIES, LLC V LEXINGTON INS CO*, 276 MICH APP 551 (2003)?

Plaintiffs-Appellants answer "NO".

STATEMENT OF FACTS

A full recitation of the facts is found in Plaintiff's Application for Leave to Appeal, pp. 1-8. For present purposes a short summary will suffice.

Plaintiffs George and Thelma Nickola[1] purchased automobile insurance from MIC General Insurance Company, Defendant in this coverage dispute. As part of the contract, the Nickolas purchased under-insured motorist ("UIM") coverage. Under that coverage, if the Nickolas were injured by an at-fault driver with liability insurance policy limits less than $100,000, MIC promised to pay Plaintiffs the difference between their actual damages and the tortfeasor's policy limits, up to $100,000 per person in full. Arbitrators found that the damages sustained by the Nickolas each exceed the tortfeasor's $20,000 limits, so Plaintiffs are indisputably entitled to recover from their insurer, MIC, under the UIM insurance.

The motor vehicle collision occurred in April, 2004, but MIC has still not paid the insurance benefits due: $80,000 to George Nickola and $33,000 to Thelma. Since the insurer never responded to Plaintiff's submission as required by MCL 500.2006(3), it is established that their proof of loss (Ex. 6, Ex. 7, Ex. 8 to Plaintiffs' Application) is satisfactory. Angott v Chubb Group Ins Co, 270 Mich App 465, 485-486; 717 NW 2d 341 (2006).

The principal issue is whether Plaintiffs are entitled to 12% penalty interest under the Uniform Trade Practices Act ("UTPA"), MCL 500.2001 et. seq.

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[1] During the pendency of the insurance coverage litigation, both George and Thelma Nickola passed away, so the case has continued in the name of their Personal Representative. This Brief continues to refer to Mr. and Mrs. Nickola as the Plaintiffs-Insureds.

That, in turn, depends on how one characterizes the relationship between the Nickolas and MIC. Under MCL 500.2006(4), "if the claimant is the insured [or] directly entitled to benefits under the insured's contract of insurance", penalty interest is mandatory ("shall bear") if the benefits are not paid "within 60 days after satisfactory proof of loss was received by the insurer". However, "[i]f the claimant is a third party tort claimant", interest is payable only if, "the claim is not reasonably in dispute".

The benefits were not paid "within 60 days after satisfactory proof of loss", Plaintiffs sought UTPA interest applicable "if the claimant is the insured". The lower courts ruled that Plaintiffs were required to prove that "the claim [was] not reasonably in dispute" under the second sentence which applies, "[i]f the claimant is a third party tort claimant".

Plaintiffs have filed an Application for Leave to Appeal. By Order of May 25, 2016, this Court ordered oral argument and supplemental briefing:

> "...The parties shall file supplemental briefs within 42 days of the date of this order addressing: (1) whether an insured making a claim for underinsured motorist benefits may be considered to be a 'third party tort claimant' under MCL 500.2006(4), thereby requiring the insurer to pay twelve percent interest for failing to pay the claim on a timely basis *only if* the claim 'is not reasonably in dispute'; and (2) whether the Court of Appeals decision in this case is consistent with Yaldo v North Pointe Ins Co, 457 Mich 341 (1998), and Griswold Properties, LLC v Lexington Ins Co, 276 Mich App 551 (2007). The parties should not submit mere restatements of their application papers...".

Plaintiffs file this Supplemental Brief pursuant to the Court's direction.

ARGUMENT

I. IN MAKING A CLAIM AGAINST THEIR OWN INSURER, FOR UNDERINSURED MOTORIST BENEFITS PURCHASED AS PART OF THE INSURANCE CONTRACT, PLAINTIFFS ARE "THE INSURED" "DIRECTLY ENTITLED TO BENEFITS UNDER THE INSURED'S CONTRACT OF INSURANCE", WHOSE ENTITLEMENT TO UTPA INTEREST IS GOVERNED BY THE FIRST SENTENCE OF MCL 500.2006(4); THEY ARE NOT "THIRD PARTY TORT CLAIMANT[S]" WHO CAN ONLY OBTAIN INTEREST IF THE CLAIM "IS NOT REASONABLY IN DISPUTE"

The Uniform Trade Practices Act ("UTPA") is an integral part of the Insurance Code. MCL 500.2006(1) characterizes the "[f]ailure to pay claims on a timely basis" as an "unfair trade practice" "unless the claim is reasonably in dispute". Sub-section (3) identifies a separate unfair trade practice. If it deems the insured's proof of loss inadequate, "An insurer shall specify in writing the materials that constitute a satisfactory proof of loss" within 30 days of receipt of the claim. For non-compliance, MCL 500.2006(4) enacts the legislative interest provision which is central to this appeal. With emphasis added to the significant language, the statute reads:

> "If benefits are not paid on a timely basis the benefits paid shall bear simple interest from a date 60 days after satisfactory proof of loss was received by the insurer at the rate of 12% per annum, if the claimant is the insured or an individual or entity directly entitled to benefits under the insured's contract of insurance. If the claimant is a third party tort claimant, then the benefits paid shall bear interest from a date 60 days after satisfactory proof of loss was received by the insurer at the rate of 12% per annum if the liability of the insurer for the claim is not reasonably in

> dispute, the insurer has refused payment in bad faith and the bad faith was determined by a court of law."

The underscored language establishes two separate interest standards in two separate sentences. The "not reasonably in dispute" requirement applies, "[i]f the claimant is a third party tort claimant". The less demanding standard, non-payment "after satisfactory proof", applies, "if the claimant is the insured" or "directly entitled to benefits under the insured's contract of insurance".

The Court of Appeals correctly began its analysis by noting that resolution of this issue "requires examination and interpretation of MCL 500.2006(4)" [slip opinion, p. 5; Nickola v MIC General Insurance, 312 Mich App 374, 384; 878 NW 2d 480 (2015)]. That should have been all that was necessary to decision.

Where the appellate court went astray was in creating a judge-made exception for contractual UIM benefits. The Court reasoned that the UIM coverage required the insurer to provide contract benefits only under circumstances where the underinsured at-fault driver would be liable for tort damages. The UIM coverage, said the appellate court, is therefore a different type of insurance coverage than coverages which insure against different risks (slip opinion, pp. 6-8; 312 Mich App at 386-388).

The approach of the courts below, in looking past the statutory language, is fundamentally flawed. As this court has often stressed, when the language of a statute is clear, principles of judicial restraint and separation of powers calls upon a court, even this Supreme Court, to construe and apply language as written. Gardner v Dept of Treasury, 498 Mich 1; 869 NW 2d 199 (2015); Fairley v Dept of Corrections, 497 Mich 290; 871

NW 2d 129 (2015); Sun Valley Foods v Ward, 460 Mich 230, 236; 596 NW 2d 119 (1999).

The Court may not second guess the wisdom of the Legislature in employing that language. Alexander v MESC, 4 Mich App 378, 383; 144 NW 2d 850 (1966); Wojewoda v MESC, 357 Mich 374, 379; 98 NW 2d 590 (1959).

In a broader sense, looking past the statutory language, the Court of Appeals misconceived the focus of the two separate sentences of MCL 500.2006(4). The statute differentiates between claims of the "insured", to whom the insurer owes direct contractual duties, and "third-party tort claimants", who are not customers of the insurance company, have no contractual relationship with the insurer, and are adversaries of the insured. The statutory language makes the identity of the claimant the distinguishing factor which governs whether interest is recoverable for failure to pay on a "timely basis", or whether "not reasonably in dispute" is the determinant.

Nothing in the statutory language restricts the insurer's interest obligation to its own insureds to only a few limited insurance forms insuring against only some risks. By its language, interest liability to an insured applies to denial of claims arising from all forms of insurance. Nothing stated by the Legislature limits the applicability of the first sentence to any particular form of insurance. It covers voluntary and required coverage alike, as well as a host of coverages for which there is room to debate the amount payable. In the face of this language, by carving out a UIM exclusion from the statute by judicial fiat, the Court of Appeals offended the principle that a Court may not create judge-made limitations or exceptions which the Legislature did not see fit to enact.

Alexander, supra; Ford Motor Co v Unemployment Compensation Commission, 316 Mich 468, 473; 25 NW 2d 586 (1947) ("The court is not at liberty to read into the statute provisions which the legislature did not see fit to incorporate").

Returning the conversation to where it belongs, on the language of MCL 500.2006(4), Plaintiffs fall within the claimant class identified in the first sentence. That class of claimant, the "insured", is not limited by whether the claim was "reasonably in dispute". Plaintiffs are "the insured" and are "directly entitled to benefits under the insured's contract of insurance". Their UIM claim, and their right to insurance benefits from their insurer, arise from the insurance contract itself. It is the UIM contract, and the UIM contract alone, that permits Plaintiffs a more adequate level of compensation from the insurer for injuries caused by tortfeasors without assets or insurance sufficient to pay for the damage they cause.

Conversely, Plaintiffs are not "third-party tort claimant[s]". They are not "tort claimants" at all. Their cause of action is strictly contractual in nature. They assert no "tort" claim against MIC General at all.

And, theirs is a "first party" action against their own insurer, not a "third party" claim. In common parlance, as well as the Yaldo and Griswold cases discussed in Issue II, a "first party" claim is a claim based on contract by an insured against his or her own insurer (as here), while a "third party" action is against one other than the insurer, typically a tort action against a negligent driver allowed to motorists whose injuries meet the no-fault threshold.

To address the Court's inquiry, Plaintiffs' first party claim is against their insurer, to enforce the contractual UIM benefits provided by the insurance policy they purchased from Defendant. It is a claim "by the insured" "directly entitled to benefits under the insured's contract of insurance". A claim by "the insured" is covered by the first sentence of MCL 500.2006(4), and "shall bear" 12% interest for non-payment after submission of "satisfactory proof of loss". This action is not brought by a "third party tort claimant", and is therefore not subject to the "not reasonably in dispute" restriction applicable to "third party tort claimants" in the second sentence of the statute.

II. THE COURT OF APPEALS DECISION IN THIS CASE IS NOT CONSISTENT WITH YALDO V NORTH POINT INS CO, 457 MICH 341 (1998) AND GRISWOLD PROPERTIES, LLC V LEXINGTON INS CO, 276 MICH APP 551 (2003)

By creating a "UIM" exception with no basis in the statutory language, the Court of Appeals offended the cardinal principle that statutory language is to be applied as written, without judge-made exceptions. The decision below cannot be reconciled with the Yaldo and Griswold Properties cases the Court of Appeals was required to follow.[2]

In Yaldo, the plaintiff sold a business on land contract to Kanouno Enterprises, which purchased a fire insurance policy. Plaintiff Yaldo was designated as a recipient of the insurance proceeds, under a lender's loss payable clause, to the extent of the balance due on the land contract (457 Mich at 343). Thus, Yaldo, as land contract vendor, was an

[2] The Court of Appeals relied on its earlier decision in Auto-Owners v Ferwerda Enterprises, 287 Mich App 248; 797 NW 2d 168 (2010), reversed in part by this Court, 488 Mich 917 (2010). Plaintiffs' challenges to the Court of Appeals decision in this case apply to the Ferwerda decision as well.

insured under the fire insurance contract, or at least "an individual or entity directly entitled to benefits under the insured's contract of insurance". Accordingly, the insurer's liability to Yaldo fell within the first sentence of MCL 500.2006(4).

The primary issue in Yaldo was whether the plaintiff's recovery bore interest at a rate of 12% under MCL 600.6013(5) ("judgment... rendered on a written instrument"). The insurer argued otherwise, contending that a 12% recovery under MCL 600.6013(5) would be inconsistent with the 12% interest recoverable under MCL 500.2006(4), the statute at issue in this case. The Yaldo Court adopted the maxim so often repeated since - -"If the language is clear and unambiguous, judicial construction is not normally permitted" (457 Mich at 346) - - and addressed the UTPA interest provision. The Court squarely rejected the insurer's argument that an insured can only obtain UTPA interest "when the claim is not reasonably in dispute" and explained (457 Mich at 349):

> "With respect to collection of twelve percent interest, reasonable dispute is applicable only when the claimant is a third-party tort claimant. Here, plaintiff is not such a claimant. Rather, he is seeking reimbursement for the loss of his business due to a fire. Therefore, plaintiff could have recovered interest at the rate of twelve percent per annum under the Uniform Trade Practices Act." (457 Mich at 349).

The Court went on to explain why the Legislature could rationally provide greater, or less restricted, interest when the claimant is an insured rather than a third party tort claimant (457 Mich at 350):

> "The Legislature's choice to impose a higher rate of interest on defendants who enter into written contracts is not arbitrary. First, there is a distinction between

> contract claims and tort claims. Tort claimants often do not have a preexisting relationship with their tortfeasors. On the other hand, there is a preexisting relationship between two parties who have signed a written contract. Greater expectations regarding performance and payments are likely to exist when the parties have established their rights and responsibilities before a controversy arises.
>
> While so great a distinction is not found between written contracts and oral contracts, there is nevertheless a greater degree of certainty when a written contract is involved. It would be logical for the Legislature to impose a higher interest rate for written instruments. Defendant's argument is especially weak in light of MCL 500.2006(4); MSA 24.12006(4), which provide for a twelve per cent interest rate when an insurance company does not pay a claim on a timely basis."

Yaldo is properly read to establish the following. Legislation is to be construed on the basis of the language used. MCL 500.2006(4) established two separate qualifications for interest, which depend exclusively on the relationship between the insurer and the claimant. Where the claimant is the insured, interest is available for delay in payment, regardless of whether the claim was reasonably in dispute. There is a rational basis for the Legislature's adoption of different standards for claims by insureds than claims by others.

The panel decision in this Nickola case conflicts with Yaldo in these critical respects. It goes outside the statutory language to create a judge-made UIM exception. The decision below disregards the sole legislative criterion, whether the claimant is the insured with a contractual relationship to the insurer. It treats the Nickolas, the insureds, as if they were required to show "not reasonably in dispute", a burden which the statute

does not impose on insureds. The Court of Appeals decision should be reversed, as it cannot be reconciled with Yaldo.

The appellate decision in this case is also at odds with the three cases consolidated under the Griswold Properties, LLC v Lexington Ins Co caption. In each of the three, the claimant submitted a claim to its own insurer which was not paid in a timely fashion. In each, it was found or assumed that the insurer had not paid in a timely fashion, but that the claim was reasonably in dispute.

The named plaintiff in Griswold Properties was the insured which sought benefits from its insurer under a policy covering flood damage (276 Mich App at 559-560). The insurer, "rejected plaintiff's documentation relating to the loss" (Id.), apparently disputing the amount of the losses (Id.). In a companion case, Gainor's Meat Packing v Home-Owners Ins Co, the insured under a fire insurance policy filed a claim which the insurer, "refused to pay... in full, asserting the plaintiff had exaggerated the loss" (Id.). In a third consolidated case, Gardner v Harleysville Lake States Ins Co, the insurer rejected the insured's proof of loss in a claim under an insurance policy insuring against water damage, claiming that the proof of loss was unsatisfactory (Id.).

Griswold Properties was decided by a seven-judge special conflicts panel which included Judge, now Justice, Zahra, and Judge, later Justice, Davis. The panel squarely addressed the issue now presented to this Court (276 Mich App at 551):

> "The conflict created by the cases at issue concerns whether a first-party insured is entitled to penalty interest under MCL 500.2006(4) when the insurer fails to pay the claim within the applicable statutory period,

> regardless of whether the amount of the claim was reasonably in dispute."

The decision in Griswold Properties was unanimous, with the Opinion written by Judge Donofrio, no neophyte in the field of insurance law. The Court reviewed the language of MCL 500.2006(4) and this Court's decision in Yaldo. The Griswold Properties panel then considered, "[t]he plain language of MCL 500.2006(4)", finding that "when read according to the accepted principles of statutory construction" (276 Mich App at 564) it allowed interest to an insured for delay in payment of insurance benefits, regardless of whether the claim was reasonably in dispute. The Court explained (276 Mich App at 565-566):

> "The first sentence concerns first-party insureds, and provides that a first-party insured is entitled to interest if benefits are not paid within 60 days after satisfactory proof of loss is provided. This sentence does not specify that a first-party insured is entitled to interest only if the liability of the insurer is not 'reasonably in dispute'. The 'reasonably in dispute' language is found only in the second sentence, which expressly applies to third-party tort claimants. As the Griswold Court stated, '[t]his Court must assume that the omission of the requirement [that the liability of the insurer be "reasonably in dispute"] in the first sentence was intentional' Griswold, supra at 549. The first sentence of MCL 500.2006(4) speaks specifically to claims filed by first-party insureds, and the Legislature's omission of the 'reasonably in dispute' language from that sentence must be construed as intentional. Pellegrom, supra at 103. Therefore, we decline to read the 'reasonably in dispute' language into the first sentence of MCL 500.2006(4). Further, we will not speculate that the Legislature probably intended that the language apply to first-party insureds, notwithstanding its absence from the first sentence".

As did Yaldo, the Griswold Properties decision looked to the language used by the Legislature. Both Courts realized that for an "insured" under the first sentence of the statute, the trigger for interest is simply failure to pay the insured in a timely fashion. "Not reasonably in dispute" is only a criterion for claims by a "third-party tort claimant" under the second sentence. For all claimants, it was their status as "the insured" which was decisive. In none of the cases was there any suggestion of an unwritten exclusion of one form of insurance coverage or another. The decision by the appellate panel in this case conflicts with Griswold Properties, as well as Yaldo, on all these points.

The panel in this case recognized the merits of Plaintiff's argument, but only "[a]t first glance" (slip opinion, p. 6; 312 Mich App at 386). Ultimately, the Court distinguished the UIM insurance involved in this case from the fire or water damage insurance in Griswold Properties because the UIM insurance contract language required Plaintiffs to establish grounds for a tort recovery against the underinsured tortfeasor as a contractual prerequisite to UIM benefits. In the view of the Nickola panel (slip opinion, p. 7-8; 312 Mich App at 389):

> "...[T]he trial court did not err by employing the language 'reasonably in dispute' found in the second sentence of MCL 500.2006(4) and denying penalty interest to plaintiff. This case does not involve a claim in which the insured simply sought payment of benefits due directly under an insurance policy. As in Ferwerda, 287 Mich App at 259, the situation in this case 'is a wholly different situation than that found' in cases such as Griswold. Rather, the claim for benefits under the UIM coverage is 'specifically tied to the underlying third-party tort claim'. (Id.) Indeed, in the UIM context, defendant is standing in the shoes of the alleged tortfeasor. The fact that the claim for UIM

> benefits was specifically tied to the underlying third-party tort claim warrants applying the language 'reasonably in dispute' found in the second sentence of MCL 500.2006(4)."

It is true that the UIM contractual insurance coverage in this case is different than the contractual insurance coverage in Yaldo and Griswold Properties regarding the risk insured against. This is a distinction without a legal difference. Nothing in the language of MCL 500.2006(4) even hints that "the insured" really means something like "the insured, but not a UIM insured". Nothing in the language of Yaldo or Griswold Properties creates or permits any such judge-made exception.

Besides that, the Court of Appeals was wrong in believing that, "[t]his case does not involve a claim in which the insured simply sought benefits due directly under an insurance policy". That is exactly what the case is about: a claim by the Nickolas, the insureds, against their own insurance company, for "benefits due directly under an insurance policy". And, "the fact that the claim for UIM benefits was specifically tied to the underlying third-party claim" does not transform Plaintiffs' claim into anything different than a first party contract claim against their own insurer. Nor do the conditions of UIM coverage change Plaintiffs' status as "the insured" or turn them into "third-party tort claimants".

While unnecessary to decision, it bears mention that UIM coverage is similar to coverage involved in Yaldo and Griswold Properties. In those cases, as here, there was no apparent dispute that the coverage itself applied. Instead, it was the amount of benefits that was in dispute. Likewise, here, there is no real dispute that the Nickolas

were injured by a driver with minimum insurance. The real dispute was whether the injuries constituted "serious impairment" - - and they clearly did - - and the amount for which the insurer was liable. In all these fact patterns, a "reasonably in dispute" standard, that would relieve the insurer of interest liability whenever there is a difference of opinion as to amount, would eviscerate the penalty interest statute and its purpose of requiring timely payment by insurers to their own insureds.

Conclusion

The decision in this case is inconsistent with the language of MCL 500.2006(4), with this Court's decision in Yaldo, and with the Court of Appeals decision in Griswold Properties. In lieu of granting leave, the Court can, and should, summarily reverse that portion of the Court of Appeals decision requiring Plaintiffs to prove "not reasonably in dispute" to recover UTPA interest for their insurer's delay in paying contractual UIM benefits.

Alternatively, leave to appeal should be granted to resolve the conflict between the decision in this case and that in Griswold Properties [MCR 7.302(B)(5)]. In the face of that precedent, the Court of Appeals decision is clearly erroneous and causes material injustice in depriving UIM insureds of UTPA interest for payment delay [MCR 7.302(B)(5)]. Minimally, the issue is jurisprudentially significant [MCR 7.302(B)(3)] as it potentially involves the applicability of the UTPA to every Michigan resident who purchases UIM insurance.

For these reasons, the Court should grant leave to appeal or summarily reverse.

RELIEF SOUGHT

WHEREFORE, Plaintiffs-Appellants pray that this Honorable Court grant their Application for Leave to Appeal.

Respectfully submitted,

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